IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 11TH JULY 2007 / 20TH ASHADHA 1929

WP(C).No. 7096 of 2004(T)

OS.494/2001 of MUNSIFF COURT, CHITTUR

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PETITIONER:

SHEIKH MUSTHAFA, ATHAYAMPATHY,
MUTHALAMADA, CHITTUR TALUK.

BY ADV. SRI.P.R.VENKETESH

RESPONDENTS:

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1. SIVASWAMY, KALLIYANKARAYAR,
S/O. SOMASUNDARA KALLIYANKARAYAR,
ATTAYAMPATHY, MUTHALAMADA,
CHITUR TALUK.

2. RUGMINI W/O. KALLIYANGARAYARA,
ATTAYAMPATHY, MUTHALAMADA, CHITTUR TALUK.

3. KALLIYAMMAL W/O. ARUMUGHA KOUNDER,
ATTAYAMPATHY, MUTHALAMADA, CHITTUR TALUK.

4. PAZHANIMALA S/O. KUTTU,
ATTAYAMPATHY, MUTHALAMADA, CHITTUR TALUK.

BY ADV. SRI.SAJAN VARGHEESE K.
SRI.LIJU. M.P

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 11/07/2007, ALONG WITH WPC NO. 19435 OF 2004 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC : 7096 OF 2004

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 : TRUE COPY OF THE INTERIM REPORT IN OS 494/01, MUNSIFF COURT, CHITTUR DT.6.11.03 SUBMITTED BY THE ADVOCATE COMMISSIONER.

EXT.P2 : TRUE COPY OF THE STATEMENT DT.05.11.2003 SUBMITTED BY THE REITRED SURVEY SUPERINTENDENT.

EXT.P3 : TRUE COPY OF THE OBJECTION SUBMITTED DT.19.11.03 IN MUNSIFF'S COURT, CHITTUR BY THE PETITIONER TO THE INTERIM REPORT OF THE COMMISSIONER.

EXT.P4 : TRUE COPY OF THE ORDER DT.6.12.03 IN IA NO.423/02 IN OS NO.494/01 PASSED BY THE MUNSIFF'S COURT, CHITTUR.

PIUS C. KURIAKOSE, J.

W.P.(C) Nos. 7096 and 19435 OF 2004

Dated this the 11th day of July, 2007

JUDGMENT

Sri.K. SajanVarghese, learned counsel for the respondent submits that the suit itself presently stands dismissed and to his information, till this moment, no application for restoration of suit has been filed. If what the learned counsel submits is correct, then both the writ petition will stand dismissed as infructuous.

Subject to the varification of the above aspect of the matter by the court below, I propose to consider the correctness of Ext.P4 in WP(C) 7096 of 2004 and also that of Exts.P3 and P4 in WP(C) 19435 of 2004 which are in fact orders passed by way of consequence of Ext.P4 in WP (C) 7096 of 2004. Ext.P4 is an order by which the court below has dismissed an application for appointment of a fresh commission for identification of the petitioner's property on the basis of title deeds and village records and to prepare a survey plan. On considering that application, the court appointed a commissioner who filed an interim report which was to the effect that the disputed property i.e., plaint item No.5 cannot be measured on the basis of the title document and village records. To that report no objections were filed by the defendants. Plaintiff filed objections. Under the impugned order, the learned Munsiff

has found inter alia that the petitioner has not taken any steps for substantiating his objections to the interim report by cross examining the commissioner or the surveyor so that the court could be convinced that the property can still be properly identified and measured on the basis of the available records. It is merely on that reason that the court became obliged to accept the interim report and closed the commission application itself without granting the request of the petitioner.

2. Having regard to the nature of suit and the nature of the contentions raised therein, I am of the view that the petitioner who is the plaintiff is to be afforded an opportunity for substantiating the objections which he had filed to the interim report of the Commissioner by cross examining the Commissioner and by examining the Surveyor. Even as I do not find any infirmity in the view taken by the learned Munsiff, I direct the learned Munsiff to permit the petitioner as the suit goes for trial to cross examine the advocate commissioner and to examine the Surveyor on the basis of the objections filed by him to the interim report. Once the petitioner adduces whatever evidence he may be able to adduce to substantiate his contention that the property is even now identifiable and once the entire evidence in the suit come on record, the court will hear the parties on the question whether the report should be remitted to the

commissioner. The approval granted by this court to the impugned order will not stand in the way of the court in taking a decision on that question. Decision will be taken by the court on that question before final judgment is delivered in the suit. In view of the decision taken by me in WP(C) 7096/04, it is not necessary that the correctness of Ext.P4 and P3 impugned in WP(C) 19435/04 is examined since both those orders have been issued as orders consequential to Ext.P4 in WP(C) 7096/04.

The petitioner will get the benefit of the directions herein only if he has filed an application for restoration of the suit at least as on today. If any such application is pending, the court will favourably consider that application and thereafter ensure compliance with the directions in my judgments.

PIUS C. KURIAKOSE, JUDGE

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